TAN POH THIAM

v.

NESTLE PRODUCTS SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
HUE SIEW KHENG JC
[APPLICATION FOR JUDICIAL REVIEW NO: MT-5-25-3-2006]
29 OCTOBER 2008

ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - To quash award of Industrial Court - Whether court's findings reasonable and fair on substantial merits of the case - Whether company justified in terminating applicant - Whether application for judicial review dismissed*

This was an application for an order of *certiorari* seeking to quash an award of the Industrial Court wherein the dismissal of the applicant was upheld by the Industrial Court. The applicant was appointed as a vendor manager by the respondent company (the company). After a year of working with the company, the applicant was served with a letter of suspension and was informed that an inquiry would be held. The applicant attended the inquiry and answered the allegations leveled against him *ie*, that he had gained unfair pecuniary advantage from the company and that he had breached company policies. At the close of the inquiry, and as set out in the company's letter of dismissal, the company accepted the applicant's explanation in respect of one allegation; the applicant's explanation in respect of the rest of the charges were found not acceptable to the company. The applicant argued that the finding of the Industrial Court that the charges against the applicant had been proven was not a finding that would have been made by a reasonable tribunal directing itself on the totality of the evidence adduced. It was also contended that the Industrial Court failed to consider the principle of proportionality before arriving at its decision *ie* whether the extreme punishment of dismissal imposed on the applicant was justified.

Held (affirming Chairman's award; dismissing application for judicial review):

(1) As there had been a proper evaluation of the facts and application of the law by the Industrial Court, the award of the said court was reasonable in all the circumstances and its finding was not based on grounds of illegality or irrationality.

The court had acted reasonably and decided fairly on the substantial merits of the case and had not departed from the provisions of the Industrial Relations Act 1967. There was therefore no reason to disturb the award made. (para 27)

(2) In respect as to whether the applicant's dismissal was justified, it could not be denied that apart from competence and industry, honesty and integrity are amongst the key characteristics that any employee should possess, no matter what form of employment the employee is engaged in. However, such characteristics assumed significant importance especially for someone holding the position held by the applicant who was a senior employee of the company, being the vendor manager. The applicant clearly owed a fiduciary duty to the company and by committing the offences set out, had defrauded the company and breached that duty. The company was fully justified in dismissing him. (paras 28 & 29)

Case(s) referred to:

Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 4 CLJ 625 FC ***(refd)***

R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

For the appellant - Mathews George; M/s Mathews George & Co
For the respondent - Douglas Yee; M/s Douglas Yee

Reported by Suhainah Wahiduddin

JUDGMENT

Hue Siew Kheng JC:

[1] This is an application for an order of *certiorari* seeking to quash Industrial Court Award No. 2281/2005 dated 9 December 2005 wherein the dismissal of the applicant was upheld by the Industrial Court in Johor Bahru.

[2] The applicant was appointed as a vendor manager by the respondent company (the company) and commenced work on 20 January 1998. He was subsequently confirmed in his position on 20 July 1998.

[3] On 28 June 1999 the applicant was served with a letter of suspension and was informed that an inquiry would be held. On 2 July 1999 the applicant attended the inquiry and answered the four allegations levelled against him. On 8 July 1999 the company served him with a letter of dismissal.

[4] The four charges that the applicant had to answer were as follows:

First charge

That you have gained unfair pecuniary advantage from the Company by claiming mileage charges for at least two (2) outstation trips when on record you had also for the same two (2) trips been issued with airline tickets in your name, the particulars of which are as follows:

(a) Outstation trip to Johor Bahru between 13.11.1998 and 16.11.1998; and

(b) Outstation trip to Penang between 13.4.1998 and 14.4.1998.

Second charge

That you have breached clause 6.3 of the Company's Standing Instruction (CSI) (revised on 02.5.1988) under reference no. CSI B.4 which stipulates as follows:

6.3. Entertainment expenses at hotels or restaurants shall not be settled *via* a direct billing to the company. The most senior person (other than visitors to the market unit) shall settle the bill and claim reimbursement *via* a Travel Expense Statement to be approved by his superior who would not have attended such entertainment.

The Company now has reason to believe that you were fully aware of the full implication of the said CSI when you breached the same. The particulars of the breach are as follows:

On at least 14 different occasions you participated in having meals with at least two of your subordinates and in each of these 14 occasions you allowed your subordinates to pay for such meals expenses. Your subordinates in turn claimed these meal expenses in their routine expense statement; some of which were authorized by yourself, and these expense statements were subsequently honoured by the company.

Despite having participated in all of the 14 occasions stated in above paragraph, you in turn gained unfair pecuniary advantage from the Company by claiming in your own right, meal expenses not in excess of RM10.00 per occasion under the unreceipted system.

Your conduct as aforesaid, clearly demonstrate your state of mind in that by doing so, you willfully and intentionally attempt to defraud the Company by gaining unfair pecuniary advantage in claiming for meal allowances on occasions in which you had already enjoyed the meals at the expense of the Company.

Third charge

That you intentionally breached the Company's policy on market returns in that on at least one (1) occasion you instructed your subordinate to prepare a Survey Sale Document No. 157730 dated 25.08.1998, knowing fully well that you were not able to show to the said subordinate the physical stock to be jobbed. It was further alleged that when queried by your subordinate, you assured your subordinate that the subject matter of the market return had been destroyed by you the previous day. We now have reasons to believe that you were fully aware that you acted in breach of the required practices of the Company pertaining to market returns in that of the need to be fully transparent in market returns exercise.

Fourth charge

That you abused your position as a senior officer of the company by committing certain unfair practices against a vendor called Nippy Trading in that on 24.04.1998 you approved two (2) Survey Sale Document nos. 156411 and 156153 (written by two separate persons) when in the normal course of business only one Survey Sale document would suffice thus creating the impression of the possibility of fictitious market returns being recorded.

[5] At the close of the inquiry, and as set out in the company's letter of dismissal, the company accepted the applicant's explanation in respect of allegation (b) of the first charge. The applicant's explanation in respect of the rest of the charges were found not acceptable to the company.

[6] In his award, the learned Chairman correctly determined the issues to be decided by the Industrial Court to be:

1. Whether the offences complained of was in fact committed by the applicant; and

2. If so, whether the proven misconduct constituted just cause or excuse to dismiss the applicant ie, whether dismissal is the appropriate punishment.

[7] Learned counsel for the applicant has argued that the finding by the Industrial Court that the four charges against the applicant had been proven was not a finding that would have been made by a reasonable tribunal directing itself on the totality of evidence adduced.

[8] It was also contended that the Industrial Court failed to consider the principle of proportionality before arriving at its decision ie, whether the extreme punishment of dismissal imposed on the applicant is justified.

[9] Learned counsel for the applicant submitted that the first, third and fourth charges were not proven and conceded that although the second charge was proven, there were extenuating circumstances.

[10] More importantly, it was contended that even if all the four charges were proven, the court should have considered whether the punishment of dismissal is justified.

[11] In reply, learned counsel for the respondent submitted on the legal principles that should be adopted by a reviewing court in judicial review and highlighted the following commentary which was referred to by the Federal Court in *Petroliam Nasional Bhd. v Nik Ramli Nik Hassan* (the *Petronas* case) [2003] 4 CLJ 625:

> It should also be noted that the Federal Court in *Rama Chandran* emphasized very carefully that the power of the court to examine the merits or substance of a decision of a public decision maker is an *exceptional circumstance* that will arise only where the factual matrix of a case required it. Otherwise, the general rule that the court will not inquire into the merits before a public decision maker still holds. (p. 634) (emphasis added).

[12] The contention of the respondent was that the applicant had failed to show that the facts are of an exceptional nature requiring the reviewing court to review the award for substance.

[13] With respect, I cannot agree with the proposition of law that the applicant has to show "exceptional circumstances" before a reviewing court can review an award for substance or merits.

[14] Steve Shim CJ (Sabah & Sarawak) in that case declined an invitation to revisit *R. Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 and affirmed the majority decision of that case that held, *inter alia*, that in judicial review proceedings, the courts have the power to review the decision of a tribunal on the merits. Although his Lordship felt it was necessary to register a cautionary note and in doing so, expressed his endorsement of the above quoted observation, his Lordship did not impose the "exceptional circumstance" test in that case. He in fact, extended the application of the *Rama Chandran* decision to other statutory tribunals and bodies, and not only to decisions from Industrial Courts.

[15] What his Lordship did lay down in the *Petronas* case was that:

> ... I take the view that *Rama Chandran* powers should only be invoked in *appropriate cases*. Otherwise, there is the danger of inculcating what a learned writer has aptly described as a "runaway development of judicial review. (see p. 634-635) (emphasis added).

[16] In his Lordship's view,

> Clearly therefore, not every case is amenable to the *Rama Chandran* approach. It depends on the factual matrix and/or the legal modalities of the case. This is certainly a matter of judicial discretion on the part of the reviewing judge. (p. 635).

[17] In this instant case, it is contended by the applicant that the decision of the learned Chairman was one that no reasonable tribunal directing itself on the totality of evidence adduced, would make.

[18] In the *Petronas* case *(supra)* the Federal Court reminded reviewing courts that:

> the Industrial Court operates under the Industrial Relations Act 1967, in accordance with principles quite different from those in the civil courts. For example, s. 30(4) and (5) of the Act stipulates:
>
> (4) In making its award in respect of trade dispute, the court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries;

(5) The court shall act according to equity, good conscience and the substantial merits of the case without regard to the technicalities and legal form. (p. 636).

[19] With this cautionary note in mind, it is expedient now to revert to the impugned award.

[20] In respect of the first charge the learned Chairman found as follows:

Berdasarkan keterangan yang dikemukakan saya dapati yang menuntut telah gagal memberitahu syarikat bahawa beliau tidak menggunakan tiket tersebut. Oleh kerana tidak ada sebarang maklumat mengenai tiket tersebut, adalah munasabah bagi pihak syarikat membuat andaian bahawa yang menuntut telah menggunakan tiket tersebut. Syarikat tidak menerima alasan bahawa yang menuntut telah mengikuti nasihat atau cadangan seorang kerani kerana seorang pengurus lebih mengetahui mengenai amalan biasa yang terpakai dalam syarikat. Saya tidak dapat bersetuju dengan hujahan peguam pihak yang menuntut yang cuba menyamakan cadangan kerani atau ketuanya supaya menyimpan tiket itu sebagai arahan. Sebaliknya jika benar wujud cadangan itu ianya hanya suatu cadangan sahaja. Walau bagaimanapun saya bersependapat dengan peguam pihak syarikat bahawa pengataan itu merupakan suatu keterangan dengar cakap sahaja (hear-say) yang tidak dapat dibuktikan. Saya bersetuju dengan peguam pihak syarikat bahawa berdasarkan kes Juhari Sadikon (seperti yang dipetik di atas) beban membuktikan pengataan ini adalah tertletak atas pihak yang menuntut. Yang menuntut telah gagal memanggil Puan Azizah atau Ivan Le Mentier untuk memberi keterangan. Oleh itu kegagalan memanggil saksi-saksi ini membolehkan peruntukan seksyen 114(g) Akta Keterangan 1950 terpakai terhadap penuntut. Berdasarkan alasan-alasan di atas saya berpendapat pertuduhan ini telah terbukti.

[21] As for the second charge, learned counsel has conceded that it has been proved. The facts of the charge are as set out in the charge. (see p. 2-3) *(supra)*.

[22] As for the third charge, the learned Chairman said:

Pada pendapat saya persoalan yang berbangkit dalam pertuduhan ini ialah adakah benar yang menuntut telah mengarahkan COW2 menyediakan Survey Sale Form (COB76) sedangkan COW2 tidak melihat barangan tersebut dan bukannya sama ada yang menuntut telah gagal memeriksa barangan tersebut secara fizikal. Pembelaan yang dibangkitkan ialah bahawa COW2 tidak diarahkan menyediakan Survey Sale Form tersebut. Pembelaan ini berlawan

dengan pembelaan dalam sesi siasatan. Saya dapati nota siasatan dalaman pada 2.7.1999 menunjukkan yang menuntut mengakui telah mengarahkan COW2 menyediakan Survey Sale Form tersebut. Dalam perbicaraan di mahkamah ini pun yang menuntut tidak menafikan perkara ini. Yang menuntut juga nampaknya tidak menyangkal tuduhan syarikat bahawa COW2 tidak melihat barangan tersebut secara fizikal. Setelah meneliti keterangan berkenaan prosidur market return daripada saksi-saksi syarikat dan yang menuntut; saya berpendapat prosidur yang sewajarnya diikuti ialah seperti yang diberitahu oleh COW1. Selanjutnya setelah mendengar keterangan yang menuntut jelas bahawa yang menuntut telah tidak mematuhi prosidur yang sedia ada. Oleh itu jelas bahawa yang menuntut telah melanggar polisi market return. Berdasarkan kepada alasan-alasan ini saya berpendapat bahawa pertuduhan ini telah terbukti.

[23] The learned Chairman found as follows in respect of the fourth charge:

Berdasarkan keterangan yang dikemukakan saya dapati yang menuntut tidak dapat mengesahkan bahawa Nippy Trading sebenar-benarnya telah membuat market return sebanyak dua kali pada hari tersebut. Yang menuntut juga telah gagal menjelaskan kenapa beliau menandatangani dua Survey Sale Form pada COB77 dan COB78 untuk Nippy Trading pada hari yang sama sedangkan ruangan checked by tidak ditandatangani oleh Branch Admin terlebih dahulu. Pada pendapat saya syarikat telah berjaya membuktikan bahawa perbuatan ini menimbulkan tanggapan terdapat kenyataan palsu mengenai rekod market return dalam kedua-dua borang tersebut telah direkodkan. COW3 telah menjelaskan bahawa kedua-dua borang itu adalah palsu dan beliau telah memberitahu bahawa syarikat telah mengalami kerugian. Pada pendapat saya pertuduhan ini juga telah terbukti.

[24] The above findings were arrived at after the learned Chairman had thoroughly considered all the evidence adduced and submissions made (see pp. 39-59 of encl. 3).

[25] On a careful perusal of the award made, I cannot detect any substantial errors in its reasoning or the findings made.

[26] As enunciated by the Federal Court in the *Petronas* case *(supra)*:

A reviewing judge might not have come to the same conclusion from the established facts but he should exercise restraint. He should not disturb such finding unless it could be shown to be based on grounds of illegality or plainly irrational. (p. 637).

[27] As there has been a proper evaluation of the facts and application of the law by the Industrial Court I am of the view that the award of the said court was reasonable in all the circumstances and its finding was not based on grounds of illegality or irrationality. I find that the court has acted reasonably and decided fairly on the substantial merits of the case and has not departed from the provisions of the Industrial Relations Act 1967. There is therefore, no reason to disturb the award made.

[28] In respect of the second issue as to whether the applicant's dismissal was justified, it is pertinent to note that in the applicant's letter of dismissal, the company said:

> 4. We have had the opportunity to deliberate and review all matters relating to your continued employment with us. Taken in its in (sic) totality we have come to the firm conclusion that arising from your conduct we have to state that we have totally lost the confidence and trust that we had reposed in you as a senior employee of the Company. Furthermore, your integrity and honesty in serving us as an employee between you and us has irretrievably broken down.

[29] It cannot be denied that apart from competence and industry, honesty and integrity are amongst the key characteristics that any employee should possess, no matter what form of employment the employee is engaged in. However, such characteristics assume significant importance especially for someone holding the position held by the applicant who was a senior employee of the company, being the vendor manager. The applicant clearly owed a fiduciary duty to the company and by committing the offences set out, had defrauded the company and breached that duty. The company was fully justified in dismissing him.

[30] The learned Chairman's award is hereby affirmed and the application for judicial review is dismissed. Both parties are to bear their own costs.